

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION
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MICHAEL HILLIARD,
TDCJ No. 1517009,

Plaintiff,

v.

JESSE L. ABSHINER, *et al.*,

Defendants.

DEPUTY CLERK

CIVIL ACTION NO.
1:12-CV-00150-BL
ECF

Assigned to U.S. Magistrate Judge

MEMORANDUM OPINION AND ORDER

Plaintiff Michael Hilliard, proceeding *pro se* and *in forma pauperis*, has filed a civil rights action pursuant 42 U.S.C. § 1983. Hilliard was confined at all times relevant to the claims in his complaint to the Robertson Unit in Abilene, Texas.

I. FACTUAL AND PROCEDURAL BACKGROUND

In his second amended complaint, (Doc. 21), against Defendant Roberston Unit employees Sgt. Jesse L. Abshiner, Sgt. Richard H. Castro, Jr., Adrian J. Vandervlist, John Pompey, and Nurse T. Geronzin,¹ as developed by his testimony at his evidentiary hearing, (Doc. 29), Hilliard claims that Abshiner, Vandervlist, and Castro inappropriately disciplined him by writing him up with “major cases,” and that Nurse Geronzin inappropriately had him placed in lockup to prevent him from harming himself.

Hilliard is seeking compensatory and punitive damages. He has consented, (Doc. 28), to proceed before the U.S. magistrate judge pursuant to 28 U.S.C. § 636(c).

¹This court has granted, (Doc. 25), Hilliard’s letter motion, (Doc. 22), to substitute Nurse T. Geronzin for Nurse T. Gleann.

II. ANALYSIS

In both proceedings *in forma pauperis* and civil actions brought by a prisoner against a governmental entity, officer, or employee, the court is required under 28 U.S.C. §§ 1915-1915A to dismiss the complaint or any portion of the complaint if the complaint is frivolous or malicious or fails to state a claim on which relief may be granted. These provisions thus apply to this *in forma pauperis* prisoner civil rights action. *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999). “An [*in forma pauperis*] complaint may be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) if it has no arguable basis in law or in fact.” *Ruiz v. United States*, 160 F.3d 273, 274-75 (5th Cir. 1998). A claim has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or if, after providing the Stewart the opportunity to present additional facts when necessary, the facts alleged are clearly baseless. *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). The court is authorized *sua sponte* to test whether the proceeding is frivolous or malicious even before the service of process or before an answer is required to be filed. *Ali v. Higgs*, 892 F.2d 438, 440 (5th Cir. 1990); *see also* 42 U.S.C. § 1997e(c)(1). A questionnaire or evidentiary hearing may be used to assist the court in determining whether the case should be dismissed under these provisions. *See Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976) (use of questionnaire to develop the factual basis of the plaintiff’s complaint); *Spears*, 766 F.2d 179 (use of an evidentiary hearing).

In order to state a claim under § 1983, a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000).

A. Due Process Claims

Hilliard alleges that he was deprived of due process of law insofar as he was given a major case, resulting in a loss of good time, custodial classification/time-earning status, and reducing the likelihood of being paroled.

In the context of the disciplinary hearing process, a prisoner's rights, if any, are governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Inmates who are charged with institutional rules violations are entitled to rights under the Due Process Clause only when the disciplinary action may result in a sanction that will infringe upon a constitutionally protected liberty interest. *See Sandin v. Conner*, 515 U.S. 472 (1995). Such liberty interests may emanate from either the Due Process Clause itself or from state law. *See Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Liberty interests arising from state law are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484 (internal citations omitted). Only those state-created substantive interests that "inevitably affect the duration of [a prisoner's] sentence" may qualify for constitutional protection under the Due Process Clause. *Id.* at 487. *See also Orellana v. Kyle*, 65 F.3d 29, 31-32 (5th Cir. 1995). Thus, a prisoner's loss of good-time credits as a result of punishment for a disciplinary conviction, which increases his sentence beyond the time that would otherwise have resulted from state law providing mandatory sentence reductions for good behavior, must be accompanied by certain procedural safeguards in order to satisfy due process. *Madison v. Parker*, 104 F.3d 765, 768 (5th Cir. 1997). However, a prisoner has a protected liberty interest in the loss of accrued good time only if he is eligible for release to mandatory supervision.

Malchi v. Thaler, 211 F.3d 953, 957-58 (5th Cir. 2000). The protections afforded by the Due Process Clause thus do not extend to “every change in the conditions of confinement” which adversely affects prisoners. *Madison*, 104 F.3d at 767. An inmate has no constitutionally protected interest in his prison custodial classification or in his future good-time earning status. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (recognizing that “[t]he loss of the opportunity to earn good-time credits, which might lead to earlier parole, is a collateral consequence of [an inmate’s] custodial status” and, thus, does not create a constitutionally protected liberty interest).

The court notes that malicious prosecution no longer provides an independent basis for a constitutional claim in the Fifth Circuit. *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (“[N]o . . . freestanding constitutional right to be free from malicious prosecution exists.”). Thus, an inmate’s claim that an officer initiated disciplinary proceedings against him without probable cause does not state a claim. Plaintiff’s bogus disciplinary case claim thus lacks an arguable basis in law or fact.

Due process requires that the prisoner receive (1) a twenty-four hour advance written notice of the hearing on the claimed violation; (2) an opportunity to be heard, including the ability to call witnesses and present evidence in his defense, when consistent with institutional safety and correctional goals; and (3) a written statement of the fact-finder detailing the evidence relied upon and the reasons for the disciplinary action. *See Wolff*, 418 U.S. at 563-67; *see, e.g., Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir. 1997) (no due process violation in denying inmate names of alleged co-conspirators when no injury has been established). Due process also requires at a minimum that “some evidence” in the record supports the disciplinary decision. *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455 (1985); *Morgan v. Dretke*, 433 F.3d 455, 457 (5th Cir. 2005); *see, e.g., Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998) (*per curiam*) (inmate’s civil

rights suit alleging that no evidence supports disciplinary action against him properly dismissed as record revealed that “some evidence” supported charge). The “some evidence” standard is extremely deferential. *Morgan*, 433 F.3d at 457.

Hilliard’s allegations concerning disciplinary cases, accepted as true, fail to state a claim upon which relief may be granted. His claims related to the major cases he received, as to all Defendants, lack an arguable basis in law or fact and should be **DISMISSED WITH PREJUDICE AS FRIVOLOUS.**

B. Inadequate Medical Care

Hilliard alleges that Nurse Geronzin made an inappropriate treatment decision to confine him for his own safety. It is well settled that the Eighth Amendment to the Constitution protects inmates from “conditions so serious as to deprive [them] of the minimal measure of life’s necessities.” *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999). In the context of medical care, or lack of care, the Eighth Amendment prohibits the unnecessary and wanton infliction of pain or care repugnant to the conscience of mankind. *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976). Not every claim of inadequate or improper medical treatment is a violation of the Constitution. *Estelle*, 429 U.S. at 105-07. In order to state a cognizable claim, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Id.* at 106. “To violate the Cruel and Unusual Punishment Clause, a prison official must have a ‘sufficiently culpable state of mind.’” *Hall v. Thomas*, 190 F.3d 693, 698 (5th Cir. 1999) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). A complainant must show that a prison official’s state of mind was “one of ‘deliberate indifference’ to inmate health or safety.” *Farmer*, 511 U.S. at 834. “The deliberate indifference standard is a subjective inquiry; the plaintiff must establish that the jail officials were actually aware of the risk, yet consciously disregarded it.” *Lawson v. Dallas County*, 286 F.3d 257,

262 (5th Cir. 2002). Thus, the prison official must “know of and disregard [the] excessive risk to inmate health or safety.” *Hall*, 190 F.3d at 697 (citations and brackets omitted). Moreover, “the facts underlying a claim of ‘deliberate indifference’ must *clearly evince* the medical need in question and the alleged official dereliction.” *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985) (citing *Woodall v. Foti*, 648 F.2d 268 (5th Cir. 1981)). “The legal conclusion of ‘deliberate indifference,’ therefore, must rest on facts clearly evincing ‘wanton’ actions on the part of the defendants.” *Id.*

The deliberate indifference requirement is more than mere negligence in failing to supply medical treatment. *Gibbs v. Grimmette*, 254 F.3d 545, 549 (5th Cir. 2001). A complaint “that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.” *Hall*, 190 F.3d at 697 (citing *Estelle*, 429 U.S. at 105). Neither “‘negligence, neglect or medical malpractice’” gives rise to a § 1983 cause of action. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (citing *Johnson*, 759 F.2d at 1238). “[N]egligent or mistaken medical treatment or judgment does not implicate the Eighth Amendment and does not provide the basis for a civil rights action.” *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993). A negligent or “inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’” *Estelle*, 429 U.S. at 105-06. While inadequate treatment “may, at a certain point, rise to the level of a constitutional violation, malpractice or negligent care does not.” *Stewart v. Murphy*, 174 F.3d 530, 534 (5th Cir. 1999). Thus, mere “negligence is insufficient to support a finding of liability”; a plaintiff must show that the Defendants were “deliberately indifferent.” *Adames*, 331 F.3d at 514.

Deliberate indifference is also more than disagreement between patient and doctor as to the appropriate treatment, except in exceptional circumstances. *Banuelos v. McFarland*, 41 F.3d 232,

235 (5th Cir. 1995) (absent exceptional circumstances, a prisoner's disagreement with his medical treatment is not actionable under § 1983). Moreover, “[u]nsuccessful medical treatment does not give rise to a § 1983 cause of action.” *Varnado*, 920 F.2d at 321 (citing *Johnson*, 759 F.2d at 1238); *Fielder v. Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979).

Rather, to show deliberate indifference to his serious medical needs, a plaintiff must demonstrate that prison officials “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Domino v. Tex. Dep’t of Crim. Justice*, 239 F.3d at 756 (quoting *Johnson*, 759 F.2d at 1238). Medical records of sick calls, examinations, diagnoses, and medications may rebut an inmate’s allegations of deliberate indifference. *Banuelos*, 41 F.3d at 235 (citing *Mendoza v. Lynaugh*, 989 F.2d 191, 193-95 (5th Cir.1993)).

Here, Hilliard’s claim of inadequate medical care amounts to a disagreement between patient and doctor as to the appropriate treatment, which is not actionable under § 1983. *Banuelos*, 41 F.3d at 235. Accordingly, his claim against all Nurse Geronzin for inadequate medical treatment lacks an arguable basis in law or fact and should be **DISMISSED WITH PREJUDICE AS FRIVOLOUS**.

C. Conditions of Confinement Claim

Serving time in prison “is not a guarantee that one will be safe from life's occasional inconveniences.” *Holloway v. Gunnell*, 685 F.2d 150, 156 (5th Cir.1982). Courts have repeatedly held “that the Constitution does not mandate prisons with comfortable surroundings or commodious conditions.” *Talib v. Gilley*, 138 F.3d at 215 (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

Here, Hilliard alleges in his second amended complaint and his testimony that when he was ordered to lockup for his own protection by Nurse Geronzin, he suffered a seizure and was forced to spend three days lying in his own bodily fluids. The Fifth Circuit has held that virtually

permanent conditions of cells that contained excrement and other filth violate the Eighth Amendment. In *Harper v. Showers*, 174 F.3d 716, 716 (5th Cir.1999), there were “continual” conditions of “filthy, sometimes feces-smeared cells,” and in *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir.2004), there were “‘extremely filthy’ [cells] with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles on the walls.”

By contrast, in *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir.1998), the Fifth Circuit found no constitutional violation when a prisoner was locked in a “management cell” for three days, where the cell was, “according to *Davis*, ‘just filthy, with ‘blood on the walls and excretion on the floors and bread loaf on the floor.’” *Davis*, 157 F.3d at 1004, 1006. The appeals court quoted the Supreme Court’s holding that “‘the length of confinement cannot be ignored.... A filthy, overcrowded cell ... might be tolerable for a few days and intolerably cruel for weeks or months.’” *Id.* at 1006 (quoting *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978)). The Fifth Circuit found that “Davis did not suffer an extreme deprivation of any ‘minimal civilized measure of life’s necessities’ “ when he was confined in the cell for only three days. *Id.* (quoting *Wilson*, 501 U.S. at 304).

Hilliard’s case clearly falls within the ambit of the Fifth Circuit’s holding in *Davis*, *id.* at 1006. Accordingly, this claim should be **DISMISSED WITH PREJUDICE AS FRIVOLOUS**.

D. Retaliation Claims

In order to sustain a § 1983 retaliation claim, a plaintiff must establish: (1) the existence of a specific constitutional right; (2) the defendant’s intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation. *Freeman v. Tex. Dep’t of Crim. Justice*, 369 F.3d 854, 863 (5th Cir. 2004) (citing *Woods*, 60 F.3d at 1166). The inmate must allege more than his personal belief that he is the victim of retaliation. *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999). Mere conclusory allegations of retaliation are insufficient to support a claim of retaliation. *Id.* The

plaintiff “must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of incident . . . would not have occurred.” *Woods*, 60 F.3d at 1166. A plaintiff is required to “produce direct evidence of motivation” or “allege a chronology of events from which retaliation may plausibly be inferred.” *Id.* The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions. *Id.* at 1166 (citing *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994)). To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims.

Hilliard’s factual allegations, accepted as true, fail to demonstrate that the requirements of a retaliation claim have been met. Lacking an arguable basis in law or fact, Hilliard’s retaliation claims should be **DISMISSED WITH PREJUDICE AS FRIVOLOUS**.

E. Official Capacity Claims

Hilliard has not indicated whether he is suing the Defendants in their official as well as individual capacities.

The Eleventh Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983. *Aguilar v. Tex. Dep’t of Crim. Justice, Institutional Div.*, 160 F.3d 1052, 1054 (5th Cir. 1998) (citing *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 875 n.9 (5th Cir. 1991)). A state’s sovereign immunity is not waived for claims pursuant to 1983. *Id.* (citing *Quern v. Jordan*, 440 U.S. 332, 338 n.7 (1979)). Moreover, the State of Texas has not consented to this suit. *Id.* (citing *Emory v. Tex. State Bd. of Med. Exam’rs*, 748 F.2d 1023, 1025 (5th Cir. 1984)). As an instrumentality of the state, TDCJ is immune from a suit for money damages

under the Eleventh Amendment. *Talib*, 138 F.3d at 213. Federal claims against state employees in their official capacities are the equivalent of suits against the state. *Ganther v. Ingle*, 75 F.3d 207, 209 (5th Cir. 1996). The Eleventh Amendment immunity thus extends to TDCJ-ID officers acting in their official capacity. *Aguilar*, 160 F.3d at 1054.

In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court carved out an exception to Eleventh Amendment immunity noting that a state cannot confer authority on its officers to violate the Constitution or federal law. *See Aguilar*, 160 F.3d at 1054. However, under this exception an individual official may be liable only for implementing a policy that is “itself [] a repudiation of constitutional rights” and “the moving force of the constitutional violation.” *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 169, 170 (5th Cir. 1985)). Plaintiff’s allegations fail to demonstrate any such policy.

Moreover, as States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA, Plaintiff’s claims for money damages against the Defendants in their official capacities, lack an arguable basis in law or fact. *See Sossamon*, 131 S. Ct. at 1663.

Insofar as Plaintiff asserts claims against the Defendants in their official capacities, these claims lack an arguable basis in law or fact and should be be **DISMISSED WITH PREJUDICE AS FRIVOLOUS.**

III. CONCLUSION

The court finds that Plaintiff has failed to state a cognizable constitutional claim against Defendants in either their official or individual capacities.

IT IS, THEREFORE, ORDERED that all such claim(s) against any Defendant(s) are **DISMISSED WITH PREJUDICE AS FRIVOLOUS.**

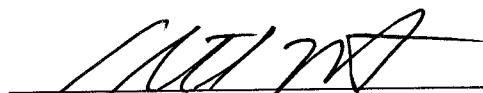
Judgment shall be entered accordingly. This dismissal shall count as a qualifying dismissal under 28 U.S.C. § 1915(g) and *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996). Dismissal of this action does not release Plaintiff or the institution where he is incarcerated from the obligation to pay any filing fee previously imposed. *See Williams v. Roberts*, 116 F.3d 1126, 1128 (5th Cir. 1997).

Any pending motions are **DENIED**.

A copy of this order shall be sent by first class mail to all parties appearing *pro se* and to any attorney of record by first class mail or electronic notification.

SO ORDERED.

DATED this 4th day of February, 2013.



E. SCOTT FROST
UNITED STATES MAGISTRATE JUDGE